

1 IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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3 NORTHERN CALIFORNIA POWER)
4 AGENCY, et al.,) Case No.
5 Plaintiff,) 14-817C
6 vs.)
7 THE UNITED STATES OF AMERICA,)
8 Defendant.)

9

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11 Suite 609
12 Howard T. Markey National Courts Building
13 717 Madison Place, N.W.
14 Washington, D.C.
15 Wednesday, January 3, 2018
16 10:00 a.m.
17 Pretrial Conference (Telephonic)

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21 BEFORE: THE HONORABLE THOMAS C. WHEELER

22

23

24

25 Elizabeth M. Farrell, CERT, Digital Transcriptionist

1 APPEARANCES:

2 ON BEHALF OF THE PLAINTIFFS:

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23 ALSO PRESENT:

24 Jane Luckhardt, Esq., NCPA

25 Lisa Akin, Paralegal, USDOJ

1 P R O C E E D I N G S

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3 (Proceedings called to order, 10:06 a.m.)

4 THE COURT: We're on the record this morning
5 for our pretrial conference in Northern California Power
6 Agency vs. the United States, docket number 14-817C.
7 And, Mr. Ralston, you're there?

8 MR. RALSTON: Your Honor, I am here, along with
9 my colleagues Frank Murray and Krista Nunez from Foley &
10 Lardner, and calling in from California is Jane
11 Luckhardt, Esq., the general counsel of Plaintiff,
12 Northern California Power Agency.

13 THE COURT: All right, thank you. Welcome to
14 you all.

15 And for the United States?

16 MR. OLIVER: Yes, this is Davis Oliver for the
17 United States. I'm joined by my colleagues, trial
18 attorneys Sosun Bea, Ashley Akers and Alex Haas, as well
19 as paralegal Lisa Akin.

20 THE COURT: All right. And welcome to all of
21 you. Thank you for joining this morning.

22 I have a standard set of pretrial agenda items
23 that I'd like to go over with you and you're welcome to
24 ask any questions you may have at the end of each
25 subject. And then at the end of this, we'll open it up

1 to other questions or subjects that you wish to raise.
2 But let me just begin with these usual subjects that I
3 always discuss in a pretrial conference.

4 First of all, our trial schedule will be -- it
5 will start at 9:30 in the morning and we will typically
6 go until 5:00 p.m. in the afternoon with a one-hour lunch
7 break at about 12:30 and a 15-minute break in the morning
8 and afternoon. And I tend to be very timely, so you can
9 rely upon those scheduled times during the typical day.

10 Let me further say that when we do out-of-town
11 trials sometimes there are quirks in the -- you know, the
12 schedules that the Court has us follow that may require
13 an adjustment. But for the time being, we'll plan on
14 9:30 to 5:00 as our normal trial day.

15 Any questions about that?

16 MR. RALSTON: None from the Plaintiff, Your
17 Honor.

18 THE COURT: All right.

19 MR. OLIVER: No, Your Honor.

20 THE COURT: Okay. Let me move then to opening
21 statements. I typically permit 30 minutes per side for
22 opening statements at the beginning of trial. The
23 Defendant may reserve its opening statement until the
24 start of its case if they wish, but normally both sides
25 do their opening statement at the beginning. And in

1 response to a question often asked, it's fine with me if
2 witnesses who are scheduled to testify want to sit in and
3 listen to the opening statement. That's fine.

4 Any questions about that?

5 MR. RALSTON: No, Your Honor.

6 MR. OLIVER: No, Your Honor.

7 THE COURT: All right. Let me go then to
8 Federal Rule of 615 and the exclusion of fact witnesses.
9 I favor this procedure and will tend to follow it unless
10 there is an unusual reason not to. So after a witness
11 testifies, the witness may remain in the courtroom if
12 they wish, unless counsel anticipates that the person may
13 appear again as a rebuttal witness later in the trial.

14 This rule does not apply to expert witnesses.
15 Expert witnesses on either side may remain in the
16 courtroom throughout the proceedings. And then also the
17 other exception is that each party is entitled to one
18 representative in court during the trial. The person
19 designated for this role should remain the same
20 throughout the trial.

21 Do you know at this point who your in-court
22 representatives will be?

23 MR. RALSTON: Your Honor, yes, on behalf of the
24 Plaintiffs, it will be James Takehara.

25 THE COURT: Okay.

1 MR. RALSTON: Of Northern California Power
2 Agency.

3 THE COURT: Okay. And for the United States?

4 MR. OLIVER: Yes, Your Honor. It will be
5 Heather Casillas from the Bureau of Reclamation.

6 THE COURT: Okay, very good. Do you have any
7 questions about Rule 615?

8 MR. RALSTON: None by the Plaintiff, Your
9 Honor.

10 MR. OLIVER: I'd just note, Your Honor, per the
11 exception that you just noted, that Heather Casillas,
12 she's on the may call list for -- she's on the may call
13 list for Plaintiffs as -- her name is Heather Lindell
14 (phonetic). That's her maiden name now.

15 THE COURT: Okay.

16 MR. OLIVER: But in any event, she is our
17 representative.

18 THE COURT: All right. And the way that will
19 work, of course, is that Ms. Casillas can be in the
20 courtroom for all the proceedings and when it's time for
21 her to testify, if she does, she'll just come up and take
22 the stand and then resume her position at counsel's table
23 after it's over.

24 Let me raise a slightly related subject at this
25 point and that is discussions with or among witnesses.

1 This is common sense, but I've had problems with it
2 before. That is, fact witnesses who have testified shall
3 not discuss any aspect of their testimony or the
4 proceedings they have observed with other fact witnesses
5 who have not yet testified. You should not and shall not
6 share trial transcripts with fact witnesses who have not
7 yet testified, and after a witness has been tendered for
8 cross examination, counsel or the party who called the
9 witness shall not have any discussions about the facts
10 with that person until the cross examination is
11 completed.

12 The reason I say that I've had some issues in
13 this context before, I had a case not too long ago where
14 the Government's expert witness was actually conferring
15 with Government counsel during a break sort of along the
16 lines of how am I doing, is there anything that I should
17 do better. And the Plaintiff's counsel had observed this
18 discussion occurring in the hallway and brought it to my
19 attention, and it resulted from that witness being
20 excused from the stand before her testimony was
21 completed.

22 So it's a very important rule and one that I'm
23 quite serious about and both parties need to strictly
24 follow it. Are there any questions about that?

25 MR. MURRAY: Your Honor, this is Frank Murray

1 for the Plaintiffs. I guess the only question -- I think
2 we've had some discussions with counsel for the
3 Government on sort of some of the dual witnesses, you
4 know, that we would presumably initially call and then
5 the Government would do their direct, you know, sort of
6 combine their cross with their direct of them so as to
7 handle them in one fell swoop as opposed to having them
8 come at different stages of the proceedings. And I just
9 wanted to see if there was -- if I understand the rule
10 about the cross examination -- being tendered for cross
11 examination, how that plays into that if we were to go
12 with that type of arrangement.

13 THE COURT: Well, first of all, it's fine with
14 me if you want to agree to that kind of a procedure.
15 Generally, it's for the convenience of the witness more
16 than anything else, especially if they're from out of
17 town. But the procedure I just described would apply to
18 a witness that's been tendered for cross examination,
19 whenever that may come up, you know, during the person's
20 testimony.

21 So let's say the Plaintiff calls a witness and
22 the person is then tendered for cross examination. The
23 Government could not say, well, it's also for direct so
24 we can talk to the witness. That's not the case. You
25 know, the testimony will go forward without that kind of

1 an interruption.

2 MR. MURRAY: Thank you.

3 THE COURT: Okay. Any other questions on that
4 subject?

5 (No response.)

6 THE COURT: Okay. Then, further, as to the
7 examination of witnesses, each party is entitled to
8 essentially two examinations of each witness. So you
9 have direct examination, cross examination, redirect
10 examination and recross and then that's it. Each
11 examination each time is confined to the scope of the
12 previous examination, and then after that process is
13 completed, the witness is excused.

14 Any questions about that?

15 MR. OLIVER: No, Your Honor.

16 THE COURT: Okay. Very well.

17 MR. RALSTON: None by Plaintiffs, sir.

18 THE COURT: Okay. Let me inquire whether you
19 intend to employ technology of some kind during the
20 trial, whether it be PowerPoint, overhead projector, any
21 form of displaying an exhibit on a screen. What do you
22 plan to do in this regard?

23 MR. RALSTON: Your Honor, we'll be using Trial
24 Director for the presentation of exhibits.

25 THE COURT: Okay.

1 MR. OLIVER: The Government, likewise, will be
2 using Trial Director.

3 THE COURT: Okay. Let me say in that regard if
4 you have any reason to be in touch with the District
5 Court in San Francisco. I think we gave you this
6 information, but we're going to be at the Philip Burton
7 United States Courthouse, 450 Golden Gate Avenue, and the
8 contact person is Tana Ingle, T-A-N-A, last name I-N-G-L-
9 E. So if you have any questions about the courtroom or,
10 you know, setting up in any regard, I would suggest you
11 be in touch with her.

12 MR. OLIVER: Very good.

13 MR. RALSTON: Thank you.

14 THE COURT: Let me turn then to the subject of
15 exhibits. I would like to know -- you probably have a
16 handle on this at this point, but how many binders do you
17 think will be required first for the Plaintiffs' exhibits
18 and then for the Defendant's exhibits?

19 MR. RALSTON: Your Honor, the bound version of
20 our exhibits are 12 volumes.

21 THE COURT: Okay.

22 MR. RALSTON: Hard copy.

23 THE COURT: Okay.

24 MR. OLIVER: And the Government has one binder.

25 THE COURT: Okay. I looked at your exhibit

1 list to try to get a feel for this and your responses are
2 consistent with my assessment.

3 Let me tell you one of my concerns. I'm most
4 concerned about not taking undue amounts of time during
5 the trial to find an exhibit that is going to be
6 proffered to a witness. And with respect to the
7 Plaintiffs' 12 volumes of exhibits, I'm going to suggest
8 that you consider using a separate witness binder for
9 each exhibit -- for each witness, rather. I'm thinking
10 that when you go into your direct examination, you know
11 the exhibits you're going to use for your direct
12 examination.

13 It makes things go much more smoothly and
14 easier if I have an exhibit binder for that witness which
15 I can just keep in front of me for the duration of the
16 testimony. That versus having to go back through 12
17 volumes each time and find the exhibit, the witness
18 binder is much more preferable.

19 Do you think you can do that for us?

20 MR. RALSTON: Your Honor, yes, we can work with
21 that. We'll work with Trial Director to be able to do
22 that.

23 THE COURT: Okay.

24 MR. MURRAY: And, Your Honor, I guess the one
25 question I have on a binder, obviously, we're going to

1 have Trial Director to try to work with the witness with
2 some stuff on the screen, with some pop-outs and
3 highlighting, et cetera, but the other -- the other
4 thing, in terms of our binders, there were some native
5 spreadsheets or other native files that the Government
6 produced to us that, you know, don't print out very well
7 in hard copy, and so the exhibit that we have is a native
8 Excel file.

9 You know, I guess we'll just have to put that
10 up on the screen. I just don't know if you would rather
11 -- we could probably have that on a disk or something if
12 you would want to load it up on your own computer. But
13 just wanted to get a little guidance from you on native
14 files that are -- exhibits that are native files.

15 THE COURT: Yes, good question. We can
16 definitely use electronic copies of native files, and if
17 you want to load it on a disk for us for later reference,
18 that's going to be fine. I mean, it's virtually
19 impossible to deal with a hard copy I've found. So I
20 think that's a good point. We can do that.

21 And then the other thing is numbers of copies
22 of exhibits. Of course, you have to have furnished a
23 hard copy to opposing counsel, the opposing party, but
24 then you also have to think about how am I going to get
25 the exhibit in front of the witness for that person to

1 refer to. And for the Court's requirements, I need to
2 have a copy for myself and then you need one extra copy
3 which my law clerk and the court reporter will take
4 custody of. After the trial is over, the court reporter
5 will take control of that copy and send it back to
6 Washington as the official clerk's office copy of the
7 exhibits.

8 Do you have any questions about that?

9 MR. RALSTON: Your Honor, just let me develop
10 that a bit. So for the official record, you're
11 indicating it would be the hard -- the 12 binders of hard
12 copies that we would have there at trial --

13 THE COURT: Yes.

14 MR. RALSTON: -- or could it be the electronic
15 version?

16 THE COURT: I think it needs to be the hard
17 copy. Generally, the court reporting firm will take
18 custody of that after trial and then send it to
19 Washington.

20 MR. RALSTON: All right.

21 THE COURT: Okay. The copy that you furnish to
22 me, we'll be using in chambers in resolving the case
23 post-trial. Hopefully, at that point, we'll be able to
24 use some of your boxes that you've taken to California
25 and box them up and send them back to Washington.

1 MR. RALSTON: Yes, understood.

2 THE COURT: Okay, all right. Do we have
3 anybody involved in the trial who will be testifying from
4 a remote location, say by video?

5 MR. RALSTON: Not at this point for Plaintiffs,
6 Your Honor.

7 THE COURT: Okay.

8 MR. OLIVER: No, Your Honor.

9 MS. BAE: Your Honor, this is -- actually, this
10 is Sosun Bea from the Government. I believe Plaintiffs
11 did list, I think, two witnesses on their may call list
12 that they stated it would be possible, if they did call
13 them, to call them from Washington since they reside
14 here.

15 THE COURT: Okay. Well --

16 MR. RALSTON: This -- I'm sorry, Your Honor, go
17 ahead.

18 THE COURT: I'm amenable to taking testimony by
19 video, if necessary. You know, if it's a may call
20 situation for somebody who's going to have a limited
21 amount of testimony, it seems perfectly fine to take that
22 testimony by video versus having a person travel to
23 California. So, you know, that's very acceptable. If we
24 get to that position and you want to call those
25 witnesses, we can certainly do it that way.

1 The only complication there is if you have --
2 excuse me, exhibits that you want to show the person,
3 there has to be some arrangement to make sure the person
4 has the exhibits available to them.

5 MR. RALSTON: Yes.

6 THE COURT: Okay. All right. Next subject --
7 and this, again, is common sense, but just a few words
8 about courtroom decorum. Business attire is expected of
9 all counsel. Men should wear suits, sport coats or
10 blazers and women should dress comparably. Beverages or
11 snacks except water are not permitted in court. All cell
12 phones of any kind or other electronic devices must be
13 turned off. The exception there is for expert witnesses
14 who may be sitting in the gallery and they're taking
15 notes or referring to data they have. That's fine. I
16 just don't want a lot of cell phones going off in the
17 course of trial.

18 And then anyone who is late for proceedings,
19 whether at the beginning or after a break, that person
20 should just sit in the back in the gallery until the next
21 break in the proceedings because I don't want a parade of
22 people going to and from counsel's table as the
23 proceedings are going on.

24 Any questions about those subjects?

25 MR. OLIVER: No, Your Honor.

1 THE COURT: Okay.

2 MR. RALSTON: Your Honor, I assume for
3 electronic devices, it's permissible for counsel to have
4 their laptops for purposes of working.

5 THE COURT: Oh, sure, yeah. That's fine. I'm
6 sorry. That's a good point.

7 And then after the trial is over, in lieu of
8 closing arguments out there, I'm going to have you all
9 submit post-trial briefs, which will contain proposed
10 findings of fact and conclusions of law. This is really
11 your chance to help me write the opinion in the case. It
12 will go much more efficiently and faster if I have your
13 input on proposed findings of fact and conclusions of
14 law. And the schedule for that we will agree upon at the
15 close of trial.

16 Generally, I will receive post-trial briefs
17 from the parties concurrently and then there will be an
18 opportunity to respond to the other side's brief
19 typically about 30 days thereafter. And then after the
20 briefing is completed, we can hold what amounts to
21 closing argument at that time, and I would plan to do
22 that in Washington, D.C.

23 Any questions about that?

24 MR. OLIVER: No, Your Honor.

25 MR. RALSTON: None from the Plaintiff.

1 THE COURT: All right. I want to remind both
2 sides that you need to make arrangements with the court's
3 reporting company -- it's called For The Record, Inc. --
4 to make sure that you order a trial transcript because
5 you will find it very difficult to prepare proposed
6 findings of fact if you don't have the transcript. So
7 it's essential that you do that.

8 And then last but not least on my list of
9 items, I would like each of you to furnish a glossary of
10 terms to the court reporter and to my law clerk at the
11 very beginning of trial. This practice will result in us
12 obtaining a much more accurate trial transcript than
13 otherwise might be the case, and so compile a list of odd
14 or unusual terms that you think may come up during the
15 trial and just make sure that the court reporter has a
16 comprehensive list that he or she can refer to as we go
17 through.

18 Is there any question about that?

19 MR. MURRAY: Your Honor, on that, is the intent
20 just sort of to provide spellings of things they may here
21 phonetically and not know or is it to sort of say, here's
22 a term and here's what it means?

23 THE COURT: No, you don't have to do here's
24 what it means.

25 MR. MURRAY: Okay.

1 THE COURT: Just accurate spelling.

2 MR. MURRAY: That's what I thought, but I just
3 wanted to make sure.

4 THE COURT: Yeah. Okay. All right. Well,
5 that completes my subjects. Let me open the floor to --
6 well, let's start with the Plaintiff. Mr. Ralston, do
7 you have any other subjects you would like to raise?

8 MR. RALSTON: Thank you, Your Honor. Yes, I
9 do.

10 THE COURT: Okay.

11 MR. RALSTON: I have one evidentiary issue that
12 I think bears being discussed now and a handful of -- a
13 few other trial logistical issues --

14 THE COURT: Okay.

15 MR. RALSTON: -- that we'd like to discuss.

16 THE COURT: Sure.

17 MR. RALSTON: First, on the evidentiary issue,
18 this concerns Defendant's objections to email, statements
19 and documents of U.S. employees other than those who work
20 at the Bureau of Reclamation. I'll note in advance, Your
21 Honor, we realize the Court doesn't have the exhibits
22 currently and we're not seeking a ruling on the
23 admissibility of the merits. I'd rather raise it now
24 because, as a practical matter, we think these objections
25 effectively are a motion in limine and should be handled

1 under the Court's pretrial order as such, rather than
2 just listed in the Defendant's objections to the
3 Plaintiffs' pretrial exhibit list, which was filed last
4 Friday.

5 A short background on that, in that filing last
6 Friday, which is ECF 77, Defendant lodged a host of
7 hearsay objections to email, statements and documents of
8 U.S. Government employees other than those at the Bureau
9 of Reclamation. The main focus of those objections were
10 email, statements and documents of U.S. employees at
11 Western Area Power Administration, which is the federal
12 agency that contracts with the Plaintiffs to supply
13 hydropower from the Central Valley Project and invoices
14 and collects for the mitigation and restoration charges
15 at issue in the case. Those objections included Regina
16 Rieger, who Defendant designated as an RCFC 30(b)(6)
17 witness.

18 In our discussions with government counsel,
19 they shared that the basis for those objections is their
20 position that those government employees are not
21 considered government employees for purposes of Federal
22 Rule of Evidence 801(d)(2)(D), which provides that a
23 statement offered against an opposing party that was made
24 by the party's employee on a matter within the scope of
25 their employment is not hearsay. And Defendant, we

1 gather, contends that FRE 801(d)(2)(D) doesn't apply to
2 those U.S. Government employees, such as those assigned
3 at Western because Western has long taken a position,
4 similar to Plaintiffs' position in this litigation, that
5 the Bureau of Reclamation's failure to implement the
6 proportionality provision in Section 3407(d)(2) of the
7 Central Valley Project Improvement Act (inaudible) the
8 Plaintiffs and other Central Valley Project power
9 contractors is contrary to law.

10 I raise it today because we think those
11 objections, as a practical matter, are really a motion in
12 limine by Defendant seeking to exclude the evidence, and
13 I'll observe that they raise significant related issues,
14 such as whether the Plaintiffs may treat those U.S.
15 employees for purposes of leading questions for cross
16 examination -- direct examination as hostile witnesses.
17 In a sense, the embedded issue there is that if they're
18 not hostile witnesses, then can we interview those
19 persons prior to trial?

20 While arguably the issue should have been
21 raised earlier, as this situation where Western has taken
22 a polar opposite position from Reclamation on the key
23 issue in the case, our main point today is that it ought
24 to be briefed by Defendant in writing in advance of
25 trial. Because Defendant's position will certain impact

1 trial position -- trial proceedings considerably, we
2 ought to get clarity on those issues in advance.

3 So I'll stop there, Your Honor, and let Mr.
4 Davis -- Mr. Oliver rather --

5 THE COURT: Mr. Oliver, would you like to
6 address this subject?

7 MR. OLIVER: Absolutely. So we have, at least
8 in my practice, a somewhat -- a unique circumstance in
9 which you have a governmental agency, which is the
10 Western Area Power Administration, that has taken a
11 position that is really identical to the Plaintiffs'
12 position in this case, which is in terms of how they
13 interpret the proportionality provision at issue. And
14 the basis of the objection is that statements by Western
15 employees are hearsay and are not subject to the hearsay
16 exception because they are not statements made by a party
17 opponent.

18 The lawsuit concerns illegal exaction claims in
19 which the entity that is purportedly doing the illegal
20 exacting is the Bureau of Reclamation. They are the ones
21 that are assessing the payments, they are the ones that
22 have the methodology that Plaintiffs and Western believe
23 is contrary to the statute, and it's the Bureau of
24 Reclamation that purportedly has, according to
25 Plaintiffs, has not collected the amount of monies from

1 water contractors that they believe should be collected
2 under the law. So the party opponent, for purposes of
3 hearsay, would be the Bureau of Reclamation and not
4 Western.

5 The purposes of the hearsay exception for the
6 party opponent fit squarely for an entity like the Bureau
7 of Reclamation. But that same rationale for having an
8 exception for a party opponent does not fit for an agency
9 like Western whose interest and whose position that
10 they've taken in this litigation and historically is
11 diametrically opposed to that of the United States.

12 THE COURT: Is Ms. Rieger expected to testify
13 at trial?

14 MR. OLIVER: She's a will call. So to the
15 extent Plaintiffs -- well, I guess I could let Mr.
16 Ralston speak to that. But she is a will call witness
17 for Plaintiffs.

18 MR. RALSTON: Yes, Your Honor. We will --

19 THE COURT: She's going to testify?

20 MR. RALSTON: -- call her (inaudible).

21 THE COURT: Okay. Well, I can tell you that if
22 we have one government agency out there who agrees with
23 Plaintiffs' interpretation, I think there's a near
24 certain chance that evidence is coming into the record.
25 I don't see any other outcome there. I want to see that

1 sort of evidence because -- it seems to me the
2 Defendant's job then is to show that its own
3 interpretation by the Bureau of Reclamation is the one
4 that should govern. But I think the other evidence is
5 coming in.

6 MR. OLIVER: Right. I have no problem with
7 Regina Rieger's testimony that will come in. The issue
8 was how it comes in. Does it come in as hearsay of some
9 other witness? Does it come in as hearsay of a witness
10 that is not going to testify? I don't -- you know. So
11 I'm certainly not arguing that, you know, Western should
12 not -- that Plaintiff should be somehow precluded from
13 presenting the testimony of Western witnesses to
14 articulate Western's point of view. I understand --

15 THE COURT: Well, let --

16 MR. OLIVER: I understand what Your Honor is
17 saying.

18 THE COURT: Okay. It's difficult for me, not
19 having the exhibit in front of me. I can't really give
20 you a ruling. But, you know, based upon what you've all
21 said, I don't see this evidence, either the testimony or
22 the documents, being excluded. You know, I want to see
23 the whole record in this case. If we have a situation
24 where the two federal agencies disagree, well, that's the
25 way it is.

1 MR. OLIVER: Yes, Your Honor.

2 THE COURT: Okay. But I'm going to leave the
3 determination on individual exhibits until the time of
4 trial. That's just my initial feeling about it today.

5 MR. RALSTON: That's fine, Your Honor. I
6 understand.

7 THE COURT: Okay.

8 MR. RALSTON: Let me turn to a couple of
9 logistical -- trial logistical issues. First, with
10 respect to admission of excerpts and designation of
11 deposition transcripts of Defendant's employees, we seek
12 the Court's guidance as to what process the Court would
13 like to use to handle the admission of excerpts and
14 designation of deposition transcripts of those employees.
15 The Court's pretrial order does not specifically address
16 a process for admission of deposition designations, and
17 Appendix A really specifically doesn't apply to FRE 801
18 depositions, which all of these were. So it would be
19 helpful for us to know how the Court would like to
20 proceed on that point.

21 By way of short background, Your Honor, we
22 proposed six Reclamation employees and one Western
23 employee. That's Ms. Rieger who was just mentioned. If
24 the Court's had an opportunity to look through
25 Plaintiffs' memorandum for contentions of fact, you'll

1 see that we have done transcript excerpts and
2 designations by page and line number throughout the
3 document that are drawn from those depositions filed --
4 and that was filed back in October, October 30th.

5 THE COURT: Okay. Well, let's --

6 MR. RALSTON: Also --

7 THE COURT: Go ahead.

8 MR. RALSTON: I'm sorry, Your Honor.

9 THE COURT: Go ahead. You go ahead.

10 MR. RALSTON: The last point is, in the
11 interest of completeness, we provided the entire
12 deposition transcripts as exhibits -- as Plaintiffs'
13 exhibits. I'd underscore we had no expectation the Court
14 would read the depositions in their entirety, not needed,
15 not desired. They were provided simply as a matter of
16 convenience to the parties so that if there were
17 disagreements on interpretations and a desire for
18 additional designations, that the transcripts were there
19 and available readily to the Court and to the parties.

20 Our only question today is how the Court would
21 like to proceed in terms of the admission of the excerpts
22 and designations. Thank you.

23 THE COURT: All right. Well, first of all, you
24 understand that our Court has nationwide jurisdiction and
25 that the Court has a strong preference to receive the

1 live testimony in court of all witnesses who are
2 presented by the parties. If the parties can agree on
3 designations of depositions that they want to use in lieu
4 of live testimony, I have no objection to that. It's
5 frequently done where maybe the witness has a limited
6 role or you have limited testimony that you want to
7 present, and if the parties have no objection to it, I
8 can receive excerpts from depositions.

9 But the problem with just the wholesale
10 introduction of deposition testimony is that I -- you
11 know, the opposing party hasn't had any chance to cross
12 examine typically and so, you know, I'm reluctant to do
13 that. So more than likely, if the Government objects,
14 these depositions would not come in.

15 MR. RALSTON: Your Honor, I would note that all
16 of the depositions at issue here are government employees
17 so that they would be covered under 801. In addition,
18 all but one was a 30(b)(6) designee as well, and under
19 Rule 32 of the RCFC rules would be admissible for any
20 purpose. That's, in essence, the legal support for our
21 position on that.

22 Most of these witnesses will be examined at
23 trial and are on our will call list, but there may very
24 well be aspects of their deposition testimony that would
25 be relevant as well. And in each of the cases, the

1 Department of Justice defended those witnesses at the
2 depositions. So they had the opportunity to rehabilitate
3 them if they felt there was something that was said
4 erroneously.

5 THE COURT: Well, if the witness is going to
6 testify anyway, the deposition, at that point, can be
7 used for impeachment purposes only and that's the way it
8 should be treated. So just to summarize, the depositions
9 do not come into evidence automatically. The witness
10 testifies in court and is subject to then cross
11 examination, but the deposition may be used for
12 impeachment.

13 MR. RALSTON: Will Your Honor entertain a post-
14 trial motion to admit aspects of depositions if we feel
15 that's appropriate?

16 THE COURT: Sure. You know, we'll see what
17 transpires during trial. You're always welcome to file
18 any motion you deem necessary.

19 MR. RALSTON: Very good. Thank you.

20 THE COURT: All right.

21 MR. RALSTON: The next point is that we do have
22 some exhibits to move into evidence at the commencement
23 of trial that we've reached agreement with government
24 counsel on, so we'll need to plan a little time at the
25 commencement of trial to handle that.

1 THE COURT: You have some Joint exhibits,
2 right?

3 MR. RALSTON: We have Joint exhibits. We also
4 have reached agreement on admission of some of the
5 Plaintiffs' exhibits as well --

6 THE COURT: Okay.

7 MR. RALSTON: -- that there is no objection to.
8 We sought agreement and the Government was going to agree
9 because those matters have been stipulated to and there
10 are documents -- in essence, corporate documents and
11 contracts between the Plaintiffs -- contracts between the
12 Plaintiffs and Western and corporate documents
13 establishing the legal right of the Plaintiffs to be in a
14 position of contracting and to make the claims. And as a
15 result of our agreement, they're able to excuse a number
16 of corporate witnesses who otherwise would have had to
17 have been called.

18 THE COURT: All right. The answer is sure.
19 I'm willing to receive at the start of trial any exhibits
20 to which there is no objection. And I think, at this
21 point, that includes the Joint exhibits and then any
22 other exhibits on which you've reached agreement.

23 MR. RALSTON: And a related point, Your Honor,
24 on this exhibits. We'd note in the pretrial order the
25 Court's statement that if a document isn't discussed at

1 trial, the Court would generally not extend it much
2 weight. I think with respect to these documents, they
3 aren't -- we won't have a witness now testifying about
4 them, but we've reached stipulations on that. So I don't
5 think that would be really applicable here, but I just
6 wanted to raise it in case the Court was of the view that
7 even with respect to these admitted documents, you wanted
8 to have at least some witness touch them and explain what
9 those documents are.

10 THE COURT: No, I don't think that will be a
11 problem since you have stipulations on many of these
12 subjects. The problem I was trying to address in the
13 pretrial order is that sometimes parties will give me a
14 lengthy, complex document and expect me to figure it out,
15 and that's not going to fly. But in this situation, I
16 think it will be fine.

17 MR. RALSTON: Thank you. The next point is
18 that Defendant has mentioned earlier -- Mr. Oliver
19 mentioned earlier that he intends to combine cross
20 examination and direct examination with respect, I think,
21 really to all of the government witnesses who we will be
22 calling because they all will be out of town in light of
23 the trial being in San Francisco. We're fine with that
24 with the understanding that that will be the only direct
25 examination opportunity for witnesses handled in that

1 manner. I think your prior comments, Your Honor, covered
2 that pretty thoroughly, but I wanted to make that point
3 of record so that there's no disagreement on that.

4 THE COURT: I think that what you say is
5 correct. Mr. Oliver, do you have any contrary view?

6 MR. OLIVER: No. What you said -- what Your
7 Honor said earlier, I understand that's the way we're
8 going to proceed. So I have no further comment.

9 THE COURT: Okay, that's fine. This issue is
10 normally dealt with by agreement between counsel. It is
11 convenient during the examination for the Government to
12 say, I finished my cross examination and now I'm going to
13 move to direct examination, just so we know what the
14 dividing point is. But, yeah, that's fine.

15 MR. RALSTON: Very good. The next issue is --
16 or next point is that we have prepared a version of
17 Plaintiffs' memorandum of contentions of fact that --
18 with conforming citations to the Joint exhibits and
19 Plaintiffs' exhibits. As originally filed, Your Honor,
20 it had citation to the deposition exhibits rather than to
21 the now -- what are now the Plaintiffs' exhibits. As a
22 convenience to the Court, we would propose to make that
23 available now, and with the Court's approval, would file
24 a copy so it's readily available to the Court and the
25 parties. So I wanted to seek the Court's guidance as to

1 how to proceed in that respect.

2 THE COURT: So if I understand correctly,
3 you're taking your original contentions of fact and law
4 and substituting exhibit citations instead of deposition
5 citations?

6 MR. RALSTON: Deposition exhibits. Deposition
7 exhibits --

8 THE COURT: Okay.

9 MR. RALSTON: -- which were then made into
10 Plaintiffs' exhibits.

11 MR. MURRAY: Your Honor, as we were filing both
12 the exhibit list and the contentions of fact
13 simultaneously -- and I'm sure Mr. Oliver has a similar
14 experience -- the exhibit ordering and selection was sort
15 of changing up to the minute. So we did not, as of that
16 filing, have the ability to sort of go back and conform
17 citations either to documents that have been used as
18 exhibits in the depositions, we used the deposition
19 exhibit citations, or just Bates numbering from
20 government documents or other references to the
21 documents. So we subsequently had the chance to go
22 through and conform those citations to actual Plaintiffs'
23 and Joint trial exhibits.

24 And so we think it's easier to track where the
25 citation is based on the exhibits as they've been

1 designated. So that's the purpose is sort of to make the
2 ease of reference to the citations.

3 THE COURT: Sure, that's fine. If you want to
4 do that, it's no problem.

5 MR. RALSTON: We'll file it as a corrected
6 version.

7 THE COURT: That sounds good.

8 MR. RALSTON: There are two other points. As
9 the Court may have gathered from this conversation, we
10 will have some changes in our witness will call/may call
11 list. And, fortunately, by virtue of the cooperative
12 aspects between counsel, we'll be able to avoid calling a
13 number of witnesses. Would the Court want us to file
14 revised versions of our witness list or simply leave that
15 to counsel?

16 THE COURT: Well, I would like to have the most
17 current version of the witness list before we start
18 trial. So please submit a copy to the Court. I think,
19 again, calling it a corrected copy will be fine. And I'm
20 assuming Mr. Oliver doesn't have any objections, but if
21 there's anything in the way of a surprise, he may.

22 MR. OLIVER: That's correct, Your Honor.

23 THE COURT: Okay.

24 MR. RALSTON: And on a similar point, Your
25 Honor, I think this -- really, you've answered it, and

1 that is I understand there may be some updating of the
2 Joint exhibits. We can simply file a corrected version
3 of that list or we can do a motion for leave to file,
4 either way.

5 THE COURT: Let's do --

6 MR. MURRAY: And, Your Honor, I'll just offer a
7 little explanation on that. You know, the Joint exhibits
8 include a lot of the annual letters about the Restoration
9 Fund collections and there was one that was issued in
10 November, so after the Joint exhibit list was filed, and
11 both parties agree that that should be a Joint exhibit.
12 And so, you know, we can certainly file a sort of
13 corrected and updated version of that.

14 And there are aspects of -- you know, the first
15 Joint exhibit was a spreadsheet that reflected
16 Restoration Fund collections through fiscal year 2016,
17 which was the most current as of when we filed the Joint
18 exhibit list. Since then, they've closed the books on
19 2017, and so both parties have agreed that that
20 spreadsheet should be updated.

21 So I think there are some updates to some of
22 the exhibits that may -- you know, pages may have been,
23 you know, inadvertently omitted or other things that
24 don't require revision of the exhibit lists. And so I
25 assume those we can probably handle just sort of offline

1 with counsel, as long as counsel are okay with, you know,
2 exchanging them and agreeing that that's what the new
3 exhibit looks like.

4 But I also wanted to address if there are some
5 additional -- you know, particularly the one exhibit I'm
6 thinking of where it's a new Joint exhibit that, in that
7 case, we should file I guess a corrected copy of the
8 Joint exhibit list or updated or however you want to
9 frame it.

10 THE COURT: I think what you say is correct.
11 Do you agree, Mr. Oliver?

12 MR. OLIVER: Yes, I'm fine with filing a
13 corrected Joint exhibit list.

14 THE COURT: Okay. Tell me, do the Joint
15 exhibits comprise one volume?

16 MR. MURRAY: Yes, Your Honor.

17 MR. OLIVER: Yes, Your Honor.

18 THE COURT: Okay, good. All right, that sounds
19 fine.

20 MR. RALSTON: Your Honor, really our last point
21 is that the headlines of today, one can't help but not
22 wonder that come January 19th, there may be a government
23 shutdown. Should that happen -- perhaps the Court has
24 faced that issue before given its unfortunate regularity
25 -- I would expect that we might have witness issues, so I

1 wanted to raise it and get -- have the benefit of the
2 Court's thinking on that circumstance should it arise.

3 THE COURT: Well, first of all, as far as I am
4 concerned and court personnel in my chambers are
5 concerned, we are regarded as essential employees, so we
6 don't do anything different when there's a shutdown.
7 Also, since we are -- we will have embarked on an out-of-
8 town trial, everybody is expected to follow through.
9 Sometimes the Justice Department has told me that they
10 are not permitted to work, but I think they are permitted
11 to work if there's a Court direction in place for them to
12 participate.

13 So even if that should arise, I think the trial
14 will go forward as scheduled and everybody will be
15 expected to be there.

16 MR. RALSTON: That's all that we have, Your
17 Honor.

18 THE COURT: Okay. Mr. Oliver?

19 MR. OLIVER: I don't have anything else to add,
20 Your Honor, at this point.

21 THE COURT: Okay. So Mr. Ralston has covered
22 it all, I guess. All right. Well, thank you very much
23 for being available and participating today. We will see
24 you all at the U.S. Courthouse in San Francisco on the
25 morning of the 16th.

1 MR. OLIVER: Yes, Your Honor.

2 MR. RALSTON: Yes, Your Honor, very good.

3 Thank you.

4 THE COURT: Thank you. Bye-bye.

5 (Whereupon, at 10:54 a.m., the hearing was
6 adjourned.)

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1 CERTIFICATE OF TRANSCRIBER

2

3 I, Elizabeth M. Farrell, court-approved
4 transcriber, certify that the foregoing is a correct
5 transcript from the official electronic sound recording
6 of the proceedings in the above-titled matter.

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10 DATE: 1/10/2018

S/Elizabeth M. Farrell

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ELIZABETH M. FARRELL, CERT

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